NO. 87-522

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

VICTORIA A. SMITH,

Petitioner

v.

TEXAS DEPARTMENT OF WATER RESOURCES
— and
THE EXECUTIVE DIRECTOR OF
THE TEXAS DEPARTMENT OF WATER RESOURCES,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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Petitioner Victoria A. Smith files this Reply Memorandum in response to the Brief in Opposition that has been filed by Respondents pursuant to request of the Clerk of this Court.

ARGUMENT AND AUTHORITIES IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Many of the statements made in Respondents' Brief in Opposition are amply met by another reading of the Petition and its Appendix. However, some claims and misstatements in the Respondents' opposition brief

might deserve some response. This reply brief is filed by Petitioner to offer such response.

Respondents' major claim in opposing the Petition is that there is no conflict in the Circuits; and, thus, Respondent claims certiorari is inappropriate. Petitioner has not attempted to claim the existence of a pitched or bloody battle among the Circuits. However, a fair reading of the "opposition clause" cases does not produce reassurance that the various circuits are applying legal principles uniformly to cases arising under the "opposition clause" of 42 U.S.C. Section 2000e-3, Pub.L. 88-352, Title VII, Section 704 (a), Civil Rights Act of 1964, as amended, 78 Stat. 257, Pub. L. 92-261, Section 8(c), Mar. 24, 1972, 86 Stat. 109.

Respondent has wrongly characterized as a lack of conflict among the Circuits their usual willingness to cite and pay lip service to the balancing test announced in *Hochstadt v. Worcester Foundation for Experimental Biology,* 545 F.2d 222 (1st Cir. 1976), ["the *Hochstadt* balancing test"]. Petitioner does not believe the mere mention of the *Hochstadt* balancing test in a Court of Appeals opinion is a talisman that precludes further analysis or careful reading of the decisions in which the phrase occurs. Counsel have attempted in the Petition for Certiorari to realistically address, howsoever briefly, the principles manifesting differently among the Circuits concerning the nature of the protection afforded by section 704(a) of Title VII. Contrary to Respondents' insinuation, the Petition plainly states (at p.12) that most Courts of Appeals have cited *Hochstadt.* Whether the different courts apply *Hochstadt* in the same fashion is another question, however, to which the answer given by a careful reader will be "No."

Contrary to the innuendo pervading Respondents' brief, Petitioner never claimed that the Third, Fourth, Seventh and Ninth Circuits were expounding a formulaic rule of law for deciding cases under the opposition clause of Title VII's section 704(a) altogether different from the Fifth and Sixth Circuits. Rather, Petitioner's position is: (1) that the *Hochstadt* balancing test by itself is barren and meaningless as a legal standard, is easily cited to support any result, and does not serve the remedial purposes of Title VII; and, (2) that the Circuit Courts of Appeals are weighting the "balance" (such as it is) between employee rights and employer prerogatives in quite different ways -- that they are, in fact, applying different legal standards to interpret and to apply the opposition clause to concrete facts.

In their Opposition Brief, Respondents challenge Petitioner to state a workable alternative to the *Hochstadt* balancing test. Counsel for Petitioner believe they can articulate the basis for an alternative, but neither the Petition for Certiorari nor the Petitioner's Reply Memorandum is an ample forum for the amount of discussion and argument requisite to a serious analysis of such alternatives. Furthermore, Respondents neglect to acknowledge that both the Seventh and the Ninth Circuits, unlike the other circuits, apply an explicit "reasonableness test" devised by the Ninth Circuit as a needed addition to the *Hochstadt* balancing test in *EEOC v. Crown Zellerbach*, 720 F.2d 1008 (9th Cir. 1983). (discussed in the Petition at pp.11-12.) The curious fact, however, is that Title VII's remedial purposes and emphasis upon resolving employment disputes by conciliation have somehow been omitted from the legal reasoning encouraged by the *Hochstadt* balancing test.

Respondents argue that the different results in the various "opposition clause" cases cited in the Petition for Certiorari turn only on the facts of each case, rather than on differing interpretations of applicable law. It may be true that cases with different facts are going to come out differently; but such a platitude offers little help to judges trying to decide cases or to attorneys trying to advise clients about the lawfulness of particular conduct. One implication of such reasoning would be to expect different results depending upon who the plaintiff is. Does Title VII permit such fact-directed results or does it require more careful application of a reasoned rule of decision? Respondents' argument ignores the confusing precedential effect of cases like the instant one below, which give no guidance as to what legal principles will be applied in analyzing the facts of an "opposition clause" case. The truth is that the precedents set in the Fifth Circuit by the case at bar and other cases cited in the Petition will not lead to the same results as will factually analogous precedents set in other Circuits, especially the Seventh and Ninth Circuits.

For example, the facts of the Fifth Circuit case *Rosser v. Laborers' Int'l Union of North America*, 616 F.2d 221 (5th Cir. 1980), are parallel to the facts of *Jennings v. Tinley Park Community Consol. Sch. Dist.*, 796 F.2d 962 (7th Cir. 1986). However, the legal analyses and results are different. In *Rosser*, the plaintiff, a black woman, was a dues-posting clerk who worked in the office of the defendant union and was a member of the union. Her direct supervisor was the secretary-treasurer of the union. A group of

black union members felt Mrs. Rosser would be a better representative for them and persuaded her to run for election for secretary-treasurer against her boss. Mrs. Rosser was discharged by her boss two days after he was re-elected. The Fifth Circuit "reasoned" that Mrs. Rosser, by standing for election, had placed her "loyalty and cooperation...in doubt," and that therefore her employer had a valid, nondiscriminatory reason for firing her. In *Jennings,* the plaintiff was a female secretary to a school district superintendent. She drafted and delivered to the Board of Education a salary study presented on behalf of the school district's secretaries, who were disgruntled by the school district's custom of paying overtime to the custodians (all male), but not to the secretaries (all female). Two weeks after delivering the salary study to the School Board, Mrs. Jennings was fired by her boss, who said that although her work was excellent, she had not been "loyal and supportive". The Seventh Circuit ruled that the defendant had not provided a legitimate, nondiscriminatory reason for firing Mrs. Jennings, and that she was protected by the opposition clause of section 704(a). (It might be noted that while the Fifth Circuit in *Rosser* cited *Hochstadt v. Worcester Foundation, supra,* the Seventh Circuit in *Jennings* cited *EEOC v. Crown Zellerbach, supra.)* Are the *Rosser* and *Jennings* cases representative of the complete and explicit accord which Respondents claim to see among the circuits?

Respondents' opposition brief says repeatedly that the central issue in the instant case is a simple factual determination of whether Miss Smith's employer had a retaliatory motive in discharging her. This argument is born of confusion about which stage of proof in Title VII cases is at issue in the case at bar and the other cases discussed in the Petition for Certiorari. *Smith v. Texas Dept. of Water Resources,* 818 F.2d 363 (5th Cir. 1987); *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed. 207 (1981). The central issue presented in the instant case, as in most section 704(a) cases cited in the Petition, is the second stage of the *Burdine* analysis: whether the defendant-employer has articulated a legitimate, nondiscriminatory reason for the adverse action taken against the plaintiff-employee. Respondents' argument about motive goes to the third stage of the *Burdine* analysis: whether, if a legitimate, nondiscriminatory reason for discharge was successsfully articulated, the plaintiff can show that the reason given was just a pretext for unlawful retaliation. See, *Jennings v. Tinley Park Community, etc., supra,* 796 F.2d at 966, and *Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. at 252-53, 101 S.Ct. at 1093.

The question of whether the employer articulated a legitimate, nondiscriminatory reason for discharge is preeminently a legal issue in the context of an opposition clause case, since the question to be decided by the judge is whether the employee's opposition activity is of a sort that the opposition clause of section 704(a) was intended to protect or whether the conduct was criminal or so disruptive as to be unprotected. It is this issue and its treatment which is at the heart of the Fifth Circuit's opinion in the instant case.

The *Rosser v. Laborers' Int'l Union of North America* case, *supra*, and the instant case are exemplary of the Fifth Circuit's willingness to judge an employee's conduct excessively disruptive (and unprotected) regardless of the absence of evidence of disruption and regardless of whether the conduct might be constitutionally protected rather than deliberate unlawful activity against the employer.[1] The corollary to this sort of "opposition clause" reasoning is to accept virtually anything as a legitimate business reason for dismissal in the context of an employer's meeting its burden to articulate an explanation for its acts under *Burdine, supra.*

At p. 7 of their brief Respondents try to distinguish *Armstrong v. Index Journal Co.*, 647 F.2d 441 (4th Cir. 1981) from the instant case by virtue of its "crucial facts." Respondents note that in the Armstrong case, the employer had decided to fire Ms. Armstrong before she performed the act she was allegedly fired for. Rather than distinguishing *Armstrong* from the instant case, this employer conduct further highlights the parallel facts of the two cases. Just as in *Armstrong*, the decision to fire Miss Smith was made by the employer, and the paperwork was done, before she committed the act of alleged insubordination for which she was supposedly fired. *See,* Petition at pp.4-5 and Dissenting Opinion of Judge Politz reproduced at Petition Appendix P. A-8.

Respondents' opposition brief contains other errors and misstatements, though for the sake of brevity this reply memorandum is not intended to be an exhaustive catalog of such errors and will address only a few. At p. 3 of their brief, Respondents object to a statement made at p. 7 of the Petition, and intimate that Petitioner fabricated, rather than

1. An early characterization by this Court of conduct that is not protected under 42 U.S.C. §2000e-3 was "deliberate, unlawful activity against [the employer]." *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 803, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1972). This rare definition of unprotected employee conduct was ignored in the court below.

quoted, language from the opinion below which seems to Petitioner to clearly import a new requirement into the employee's burden of proof in a Title VII case -- i.e., showing that the opposed employment practice is "immoral, degrading, or dangerous to health." In fact, the quote was merely mis-cited in the Petition -- a regrettable but hardly pernicious mistake. The correct cite for the quote in question is 818 F.2d at 366. (Petition Appendix at A-5).

In one instance, Respondents' argument is either willful distortion of facts or an expression of appalling ignorance of the case and the pertinent issues on appeal. At p. 5 of their brief, Respondents' find it "not surprising" that courts rule against employees who choose "to bypass or augment established grievance procedures which all agree are fair and satisfactory." (Respondents' Brief in Opposition, p. 5.) Such observations, when used to refer to the facts or issues of the instant case or the instant appeal, create distortion. Miss Smith did utilize the Department's grievance procedures to no avail, but the record is sparse as to that proceeding and those efforts. In any case, it is certain that all do not agree the Respondents' grievance procedures "are fair and satisfactory," and to suggest there is unanimous consensus about such matters is not being candid with this Court.

Petitioner also takes issue with the accuracy of Respondents' characterization of Miss Smith's conduct as refusal to merely perform a task asked of her. What was indisputably involved was not a request that Miss Smith perform a single task, but a permanent and significant change in the duties of a female technical employee from technical to secretarial ones, something which had never been asked of male predecessors in that technical job. It was also undisputed that Miss Smith had, upon request, performed the secretarial relief duties in question before. It was only when a man who was not her usual supervisor tried to impose secretarial tasks on Miss Smith permanently and irrevocably that she showed reluctance to take on duties th t were so different from she had been hired to perform and about wh ch she had been given assurances (that were not honored).

Respondents' characterization of Miss Smith's actions implies that her conduct was disruptive to her workplace, but in fact there is absolutely no evidence of any disruption of the employer's operations in the record, aside from the ire of an executive in the agency who hung up on Miss

Smith when she attempted to discuss the matter with him over the telephone.

CONCLUSION

In addition to the reasons supporting the grant of certiorari heretofore advanced by Petitioner in her Petition and the Conclusion thereof, Petitioner says that the writ of certiorari should be granted by the Court in this case because:

A) Respondents' long-awaited Brief in Opposition to the Petition for Certiorari fails to set forth any sound reason why a writ of certiorari should not issue.

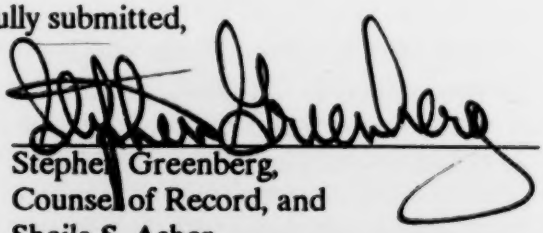
B) Contrary to Respondents' assertions, there is a discernable conflict among the Circuit Courts of Appeal regarding the interpretation and application of Title VII's "opposition clause." The basis of this conflict lies in the differing legal standards (howsoever sparsely articulated) that the various courts have adopted in considering "opposition clause" cases.

C) Contrary to Respondents' assertions, the results in the judgment and opinions below turn not merely on acceptance of the district court's fact-finding, but more fundamentally on court of appeals and district court interpretations of the law which are incorrect, or at the very least, are not harmonious with the remedial spirit of Title VII.

D) The Fifth Circuit's willingness to find most any conduct disruptive and, therefore, unprotected by Title VII's opposition clause, without any accompanying analysis or justification, suggests the necessity of review by this Court.

WHEREFORE, PREMISES CONSIDERED, Petitioner Victoria A. Smith prays that the petition for writ of certiorari be granted.

Respectfully submitted,



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